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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	:	Chapter 11
CIRCUIT CITY STORES, INC., et al.,	:	Case No. 08-35653 (KRH)
Debtors.	:	Jointly Administered

OMNIBUS REPLY BRIEF IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND SUPPLEMENTAL OBJECTIONS WITH RESPECT TO CERTAIN CLAIMS SUBJECT TO (I) THE DEBTORS' NINETEENTH OMNIBUS OBJECTION TO CLAIMS (RECLASSIFICATION OF CERTAIN MISCLASSIFIED CLAIMS TO GENERAL UNSECURED, NON-PRIORITY CLAIMS) AND (II) THE DEBTORS' THIRTY-FIRST OMNIBUS OBJECTION TO CLAIMS (DISALLOWANCE OF CERTAIN LEGAL CLAIMS)

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NATURE AND STAGE OF PROCEEDINGS

On January 13, 2009, Robert Gentry ("Gentry") filed claim number 6039 (the "Gentry Class Claim") on behalf of himself and all those similarly situated (the "Gentry Unnamed Claimants"). On January 13, 2009, Jonathan Card ("Card") filed claim number 6040 (the "Card Class Claim") on behalf of himself and all those similarly situated (the "Card Unnamed Claimants"). On January 13, 2009, Jack Hernandez ("Hernandez") filed claim number 6045 (the "Hernandez Class Claim") on behalf of himself and all those similarly situated (the "Hernandez Unnamed Claimants"). On January 30, 2009, Joseph Skaf ("Skaf") filed claim number 8717 (the "Skaf Class Claim") on behalf of himself, Gustavo Garcia ("Garcia"), Miguel Perez ("Perez") and all those similarly situated (the "Skaf Unnamed Claimants").

On June 22, 2009, the Debtors filed the Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-priority Claims) (the "Nineteenth Omnibus Objection). On August 20, 2009, the Debtors filed the Debtors' Thirty-First Omnibus Objection to Claims (Disallowance of Certain Legal Claims) (the "Thirty-First Omnibus Objection" and, together

with the Nineteenth Omnibus Objection, the "Objections"). By the Objections, the Debtors objected to the Class Claims.[1]

On February 25, 2010, the Debtors filed the Summary Judgment Motions[2] in which the Debtors sought to reclassify the Class Claims to general unsecured, non-priority claims. Also on February 25, 2010, the Debtors filed the Supplemental Objections[3] in which the Debtors further objected to the Class Claims and asserted that the Class Claims should be disallowed to the extent that they sought relief with respect to the Unnamed Claimants[4] and

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[1] The Gentry Class Claim, the Card Class Claim, the Hernandez Class Claim, and the Skaf Class Claim are referred to collectively herein as the "Class Claims".

[2] The "Summary Judgment Motions" are (i) the Debtors' Motions for and Memorandums of Law in Support of Summary Judgment on Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims) with respect to the Gentry Class Claim (D.I. 6641) and the Hernandez Class Claim (D.I. 6644) and (ii) the Debtors' Motions for and Memorandums of Law in Support of Summary Judgment on Thirty-First Omnibus Objection to Claims (Disallowance of Certain Legal Claims) with respect to the Card Class Claim (D.I. 6645) and the Skaf Class Claim (D.I. 6643).

[3] The "Supplemental Objections" are (i) the Debtors' Supplements to the Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims) with respect to the Gentry Class Claim (D.I. 6642) and the Hernandez Class Claim (D.I. 6661) and (ii) the Debtors' Supplements to the Thirty-First Omnibus Objection to Claims (Disallowance of Certain Legal Claims) with respect to the Card Class Claim (D.I. 6660) and the Skaf Class Claim (D.I. 6646).

[4] The Gentry Unnamed Claimants, the Card Unnamed Claimants, the Hernandez Unnamed Claimants, and the Skaf Unnamed Claimants are referred to collectively herein as the "Unnamed Claimants".

reduced to the amounts asserted solely by the Named Claimants.[5]

On March 17, 2010, the last date on which responses to the Summary Judgment Motions and the Supplemental Objections could be filed, the Named Claimants filed Creditors Gentry, Hernandez, Card, and Skaf's Omnibus Opposition to Debtor's Motions for Summary Judgment and Application for a Rule 56(f) Continuance (the "Continuance Request") opposing the relief sought in the Summary Judgment Motions and the Supplemental Objections and seeking a continuance under Civil Rule 56(f).

This is the Debtors' omnibus reply brief in support of the Summary Judgment Motions and the Supplemental Objections (the "Reply").

STATEMENT OF FACTS

The Debtors rely upon and incorporate by reference as if fully set forth herein the "Statement of Material Facts" in each of the Summary Judgment Motions and the "Background" in each of the Supplemental Objections. Capitalized terms not otherwise defined herein shall have

[5] Gentry, Card, Hernandez, Skaf, Garcia and Perez are referred to collectively herein as the "Named Claimants".

the meanings ascribed them in the Summary Judgment Motions and the Supplemental Objections.

ARGUMENT

In the Summary Judgment Motions, the Debtors assert that the Class Claims should be reclassified to general unsecured, non-priority claims because it is undisputed that each of the Named Claimants terminated their employment with the Debtors more than 180 days prior to the Petition Date. Consequently, the Named Claimants could not have earned any wages, salaries or commissions during that period. Accordingly, the Class Claims are not entitled to priority under Bankruptcy Code section 507(a)(4).

In the Supplemental Objections, the Debtors assert that the Class Claims should be reduced to the amount solely attributable to the Named Claimants because the Named Claimants failed to seek Court authorization to file class proofs of claim as required by Bankruptcy Rules 9014 and 7023. See In re Computer Learning Centers, Inc., 344 B.R. 79 (Bankr. E.D. Va. 2006).

In the Continuance Request, the Named Claimants argue, in summary, that they do not have enough information to oppose the Summary Judgment Motions or the Supplemental Objections because they lack the information they would

require either to determine the priority of the Unnamed Claimants' claims or to file a motion under Bankruptcy Rule 7023 seeking authorization to file a class proof, and consequently, they should be granted a continuance under Civil Rule 56(f) to conduct discovery to obtain the necessary information.

As demonstrated below, the Named Claimants' Continuance Request is simply not a response to the Summary Judgment Motions or the Supplemental Objections, but merely an attempt to provide themselves with an adjournment with respect to two straightforward legal issues: (1) whether the Named Claimants were required to obtain Court approval to file a class proof of claim prior to the Bar Date in these cases; and (2) whether the Named Claimants are entitled to priority under Bankruptcy Code section 507(a)(4) such that the Class Claims could be entitled to priority. As demonstrated in the Supplemental Objections, the Named Claimants and Class Counsel[6] were required to seek this Court's approval before filing the Class Claims, which they failed to do. Moreover, as established in the Summary

[6] Class Counsel refers to counsel to Gentry, Card, Hernandez and Skaf with respect to the Class Claims and the underlying class action lawsuits. Where applicable, references herein to the Named Claimants are references to Class Counsel as well.

Judgment Motions, even if, the Named Claimants were permitted to file the Class Claims as class proofs of claim, the indisputable facts establish that no part of those Class Claims would be entitled to priority treatment under Bankruptcy Code section 507(a)(4). Indeed, to the extent that any Unnamed Claimants hold pre-petition unsecured priority claims, the Named Claimants and Class Counsel cannot pursue their claims.

Thus, although the Named Claimants seek an adjournment to conduct discovery regarding class certification and priority, no such discovery is required to rule on the Debtors' Summary Judgment Motions and Supplemental Objections. Moreover, the Named Claimants' request for discovery is plainly untimely and would substantially prejudice the Debtors, their estates, and their creditors. Finally, to the extent the Named Claimants believe they required discovery, they were free to pursue such discovery and their failure to do so cannot be excused at this late date.

Accordingly, the Debtors assert that the Named Claimants request for a Civil Rule 56(f) Continuance should be denied and the hearing scheduled for March 25, 2010 should proceed. The Debtors further assert that the Summary

Judgment Motions should be granted and the Supplemental Objections should be sustained.

I. THE COURT SHOULD DENY THE CONTINUANCE REQUEST UNDER CIVIL RULE 56(F) BECAUSE NO ADDITIONAL FACTS ARE NECESSARY TO ADDRESS THE SUMMARY JUDGMENT MOTIONS.

The Named Claimants request that the hearing on the Summary Judgment Motions and the Supplemental Objections be adjourned to enable them to take discovery regarding, among other things, the priority of the Unnamed Claimants' claims and class certification. See Continuance Request at 11-12. The Named Claimants, however, fail to demonstrate why discovery regarding the potential class is necessary for this Court to rule on the legal issues presented by the Summary Judgment Motions or the Supplemental Objections. Indeed, as demonstrated in the Summary Judgment Motions, the Supplemental Objections and below, such discovery is unnecessary to a determination of the issues. Therefore, as demonstrated below, the Named Claimants are not entitled to relief under Civil Rule 56(f) and the hearing on the Summary Judgment Motions and the Supplemental Objections should proceed as scheduled.

A. The Standard Applicable To A Motion Under Civil Rule 56(f).

Civil Rule 56(f) provides that "[i]f a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken . . . ." Fed. R. Civ. P. 56(f). Thus, Civil Rule 56(f) allows for a continuance only where the opposing party cannot present facts necessary to justify its opposition. Consequently, to prevail on their Continuance Request, the Named Claimants must "specifically explain both why [Claimants] [are] currently unable to present evidence creating a genuine issue of fact and how a continuance would enable [Claimants] to present such evidence." Access Telecom, Inc. v. MCI Telecomm. Corp., 197 F.3d 694, 719 (5th Cir. 1999) (internal citations omitted).

Moreover, in seeking a continuance a party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts in opposition to summary judgment." Id. at 720. Accordingly, the Named Claimants are also required to state with

specificity what facts they hope to uncover and why those facts will enable them to raise a genuine issue of material fact that precludes this Court from granting the Summary Judgment Motions or the Supplemental Objections. See Raby v. Livingston, 2010 WL 909097, *8 (5th Cir. 2010)("[A] request to stay summary judgment under Rule 56(f) must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." (internal quotation and citation omitted)); see also Strag v. Board of Trustees, 55 F.3d 943, 954 (4th Cir. 1995) (holding that denial of a Civil Rule 56(f) motion for continuance is proper "where the additional evidence sought for discovery would not have by itself created a genuine issue of material fact sufficient to defeat summary judgment").

As demonstrated below, the Named Claimants have failed to carry their burden. First, there are simply no facts that would raise a relevant issue as to the Named Claimants' failure to make a timely request to file a class proof of claim. They did not do so, and on this grounds alone the Court may sustain the Supplemental Objections.

See Supplemental Objections at 11-14 (citing Computer Learning, 344 B.R. at 87). Second, even assuming that this Court were to certify the Named Claimants' classes and permit the Named Claimants to file class proofs of claim, those claims are not entitled to priority under Bankruptcy Code section 507(a)(4). Thus, the discovery requested by the Named Claimants is unnecessary and entirely irrelevant.

B. No Additional Facts Are Needed To Reach A Determination On The Supplemental Objections Because The Named Claimants Failed To Seek Authorization To File Class Proofs Of Claim As Required By Bankruptcy Rules 7023 And 9014.

In the Supplemental Objections, the Debtors assert that, prior to filing a class proof of claim, a claimant must file a motion for determination of the applicability of Bankruptcy Rule 7023. This requirement is well established in this District, see Supplemental Objections at 11-13; Computer Learning, 344 B.R. at 87, and nowhere in the Continuance Request do the Named Claimants deny that they must do so. Instead, the Named Claimants argue that they have been unable to properly file a Bankruptcy Rule 7023 motion for two reasons.

First, the Named Claimants contend that Debtors had not responded to the Class Claims or the underlying state court class action complaints in order to inform the

Named Claimants of what issues they were disputing. Continuance Request at 5, 12. Second, the Named Claimants state they have not been able to conduct discovery, apparently in connection with the proofs of claim they filed. Continuance Request at 5, 9, 11. Even if true, however, neither "fact" relieves the Named Claimants of the requirement to properly file a Bankruptcy Rule 7023 motion.[7]

Specifically, in Computer Learning, the Bankruptcy Court for the Eastern District of Virginia expressly rejected the idea that a claimant could or should wait until the debtor objected to a class proof of claim to seek authorization to file a class proof of claim. Computer Learning, 344 B.R. at 88. In rejecting that position, the bankruptcy judge stated that, "[i]n fact, the issue in controversy is whether the proof of claim may be filed as a class proof of claim in the first instance. This is the contested matter. It is resolved by filing a Rule 7023 motion which itself commences the contested matter. Logically, the Rule 7023 motion should be granted before a class proof of claim is filed. . . . A Rule 7023 motion

[7] As discussed below, the Debtors maintain that the Named Claimants had ample opportunity to conduct discovery before the bar date. See infra Section II.

filed [after objection to the class proof of claim] is merely an attempt to remedy an obvious defect that will otherwise certainly result in disallowance of the claim." Id.

Despite the clear language of Computer Learning, the Named Claimants nonetheless argue that they did not file a Bankruptcy Rule 7023 motion or seek class certification because they did not know whether the Debtors objected to class certification. Continuance Request at 5, 12. To the contrary, the Named Claimants were required to seek an order making Rule 7023 applicable and permitting filing of the Class Claims notwithstanding any objection by the Debtors, or lack thereof, on that grounds. Id. at 87 (finding that it is "clear that a class proof of claim is not permissible without an order making Rule 7023 applicable and . . . the proponent of the class proof of claim must timely obtain that order").

The Named Claimants also argue that their failure to properly file a Bankruptcy Rule 7023 motion should be excused because they have not been able to conduct discovery in connection with class certification. Continuance Request at 10-12. Even assuming the Named Claimants have been precluded from engaging in discovery –- a contention the

Debtors dispute below –- that does not excuse the Named Claimants from properly and timely filing a motion under Bankruptcy Rule 7023.

Indeed, the Computer Learning Court addressed this very issue. The Court stated, "[i]t is important to note that there are two steps in the class proof of claim process. Two decisions must be made: (1) Whether Rule 7023 should be made applicable to the proof of claim; and (2) whether a class should be certified under Rule 23." Computer Learning, 344 B.R. at 86. The Court went on to add the following:

> There may be good reasons to consider the issues together in some cases, but they remain separate decisions. One reason not to consider them together may be the extent of proof necessary to obtain certification of the class. In this case, certification in the New Jersey court took more than eighteen months to achieve. It was achieved only after significant discovery was conducted that was vigorously contested. . . . Under federal rules, the court must conduct a rigorous analysis of the certification requirements and may not accept the plaintiff's allegations as true. Gariety v. Grant Thornton, L.L.P., 368 F.3d 356, 365-367 (4th Cir. 2004). On the other hand, a bankruptcy court should make a prompt decision on the applicability of Rule 7023 even though it cannot reach the certification issue at that time. It is as important to the administration of the case to know whether a class proof of claim may be filed as to whether the class will be certified.

Id. at 86, n. 9.

Thus, while the Court recognized the potential need for discovery in connection with certification, that is not at issue at this point. That discovery comes into play only in the second step of the class proof of claim analysis outlined above. In order to get to that point, the Named Claimants were first required to file a motion under Bankruptcy Rule 7023 –- an essential step which they have, to date, failed to take.[8] Consequently, on this basis alone, the Continuance Request should be denied and the Supplemental Objections sustained.[9]

C. No Additional Facts Are Needed To Reach A Determination On The Summary Judgment Motions Because The Class Claims Should Be Reclassified Regardless Of The Priority Of The Unnamed Claimants Claims.

As discussed in the Summary Judgment Motions, Bankruptcy Code section 507(a)(4) grants priority to "allowed unsecured claims . . . earned within the 180 days

[8] Note that another party in these chapter 11 cases properly sought and obtained authorization to file a class proof of claim by filing a Bankruptcy Rule 7023 motion. (D.I. 1380). That motion was brief and did not necessitate any discovery.

[9] Even if the Court considers whether a Bankruptcy Rule 7023 motion should be granted, the relevant facts are again undisputed. Generally, the inquiry turns on a basic understanding of the bankruptcy process as compared to the class action process, as well as certain public information regarding the status and progress of the Debtors' chapter 11 cases. See Supplemental Objections at 14-27. This information is readily available to the Named Claimants and no further discovery is necessary.

before the date of the filing of the petition . . . for – wages, salaries or commissions, including vacation, severance and sick leave pay earned by an individual. . .” 11 U.S.C. § 507(a)(4). Accordingly, the Class Claims are entitled to priority only to the extent that they seek “wages, salaries or commissions” “earned within the 180 days before the date of the filing of the petition.” Here, it is indisputable that the Named Claimants were not employed by the Debtors on May 14, 2008, which date was the 180th day prior to the Petition Date.

Specifically, Gentry ceased being employed by the Debtors in 2001;[10] Hernandez ceased being employed by Debtors by no later than October of 2007;[11] Card ceased being

[10] See Gentry Class Claim, Exhibit A at 1 (“Mr. Gentry held the position of customer service manager for Circuit City. The company eliminated his [position] in 2001.”); Declaration of Robert Gentry at ¶ 2 (“In 2001, I quit my job because Circuit City was eliminating the [customer service manager] position.”).

[11] See Declaration of Jack Hernandez at ¶ 2 (“I began my employment with Circuit City in January of 2006 and worked there as a Sales Manager until October of 2006”); see also Declaration of Deborah E. Miller In Support Of Debtors’ Motion for and Memorandum of Law in Support of Summary Judgment on Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims) with Respect to the Class Claim of Jack Hernandez at ¶ 2 (“Jack Hernandez . . . was employed by Circuit City Stores West Coast, Inc. from January 3, 2007 to October 23, 2007.”). Note that, while Hernandez asserts that he worked one year previous to the dates included in the Debtors’ records, both periods fall well before May 14, 2008.

employed by the Debtors in April of 2008; [12] and, finally, Skaf, Perez and Garcia ceased being employed by the Debtors by no later than January of 2008.[13] See Summary Judgment Motions at 5. Because none of the Named Claimants is entitled to priority under Bankruptcy Code section 507(a)(4), the Class Claims filed in their names likewise cannot be entitled to priority. Thus, the Class Claims should be reclassified to general unsecured, non-priority claims, regardless of the priority of any of the Unnamed Claimants.

Notwithstanding these indisputable facts, the Named Claimants assert that the Court should delay a ruling on the Summary Judgment Motions and the Supplemental Objections to enable it to conduct discovery to determine the identities of the Unnamed Claimants –- parties that are not clients of Class Counsel and had an opportunity to file a proof of claim -- and whether certain of the Unnamed

[12] See Declaration of Deborah E. Miller In Support Of Debtors' Motion for and Memorandum of Law in Support of Summary Judgment on Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims) with Respect to the Class Claim of Jonathan Card at ¶ 2 ("Jonathan Card . . . was employed by Circuit City Stores West Coast, Inc. from November 10, 2005 to April 15, 2008.").

[13] See Skaff Class Claim, Exhibit A at 1 ("Defendant employed Mr. Skaf . . . as "Sales Manager" from January 2006 to approximately May 2007. Defendant employed Mr. Perez . . . as "Operations Manager" from approximately January 2007 to approximately January 2008. Defendant employed Mr. Garcia as "Service and Installation Manager from approximately August 200 to approximately June 2006.").

Claimants might be entitled to priority. See Continuance Request at 12. As demonstrated above, however, the Class Claims should be reclassified regardless of the identity and priority of the claims of the Unnamed Claimants. Moreover, this argument should be rejected for at least two additional reasons.

First, it is simply not clear that even if such Unnamed Claimants exist, they may be properly included in the same class as the Named Claimants under Civil Rule 23. Second, and more importantly, even assuming such Unnamed Claimants exist and could have been part of a certified class, to the extent they failed to file proofs of claim by the Bar Date, they (and Class Counsel) are estopped and barred from now pursuing their claims. Thus, the discovery that the Named Claimants request is entirely irrelevant to the Summary Judgment Motions and the Continuance Request should be denied.

1. The Named Claimants cannot properly represent the Unnamed Claimants under Civil Rule 23.

In the Class Claims, Class Counsel describes the Unnamed Claimants as all California-based holders of certain managerial positions who worked for the Debtors during a given four-year period ending with the filing of the

complaint in the class action lawsuit.[14] Because, for certain of the Named Claimants, this period would include the 180 days prior to the Petition Date, Class Counsel contends that it is possible that some of the Unnamed Claimants would hold a claim entitled to priority treatment.[15] Assuming this were true, however, because the Named Claimants hold no claims entitled to priority, their economic interest would differ significantly from the Unnamed Claimants holding priority claims and, thus, the Proposed Classes[16] could not be certified.

In particular, to certify a class under Civil Rule 23(a), the class representative must demonstrate commonality, typicality and the adequacy of representation -- requirements that "align the interests of the class and the class representatives so that the latter will work to

[14] The exact descriptions of the Unnamed Claimants are set forth in Exhibit A to each Class Claims.

[15] Specifically, Card's underlying class action was filed on November 4, 2008; and Skaf's underlying class action was filed on December 19, 2008, which, in and of itself, was a violation of the automatic stay. Gentry's underlying class action, however, was filed on August 29, 2002 and Hernandez's underlying class action was filed on April 17, 2008. Accordingly, with respect to the Gentry and Hernandez Class Claims, the underlying class action complaints were filed prior to the 180 day priority period and, thus, the Gentry and Hernandez Unnamed Claimants cannot be entitled to section 507(a)(4) priority. Nonetheless, for the purposes of argument, the Debtors here assume that any of the Unnamed Claimants could be entitled to priority.

[16] The classes for which the Class Claims were filed are referred to herein as the "Proposed Classes".

benefit the entire class through pursuit of their own goals." Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 311 (3d Cir. 1998).

With respect to adequacy of representation, the representative must show that he or she "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Adequacy" has two components: "the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." Denney v. Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006); see also Brown v. Goldstein (In re Johnson), 80 B.R. 791, 796 (Bankr. E.D. Va. 1987). While "a conflict or potential conflict alone will not . . . necessarily defeat class certification," a class cannot be certified where the conflict is "fundamental." Denney v. Deutsche Bank AG, 443 F.3d at 268.

Here, the Named Claimants cannot show that they could adequately represent the Proposed Classes because the Named Claimants, as class representatives, do not hold claims that are entitled to priority. That is, assuming certain members of the Proposed Classes hold claims entitled

to priority, the recoveries of the Named Claimants would be inversely related to the recovery of Unnamed Claimants holding priority claims. Specifically, the fewer the number of, and the lesser the amount of, any priority claim that are allowed, the greater the pool of assets remaining to be shared between the general unsecured creditors and, thus, the Named Claimants. This is a fundamental conflict of interest, as the Named Claimants will have a direct disincentive to vigorously pursue the priority claims of the Unnamed Claimants. Thus, where the Named Claimants are not entitled to priority and the Unnamed Claimants are entitled to such priority, the interests of the class and the class representatives would not be aligned and the class could not be certified. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626-27 (finding class representatives could not adequately represent class where class contained plaintiffs with conflicting interests).

2. The Named Claimants are prohibited from pursuing the claims of the Unnamed Claimants.

Finally, and more importantly, even assuming that the Named Claimants could properly represent the Unnamed Claimants with respect to their claims, they are now barred

from doing so and, consequently, the discovery that the Named Claimants seek is entirely irrelevant.

As this Court well knows, the General Bar Date for filing proofs of claim was January 30, 2009. Critically, the Claims Bar Date Notice provided that:

> **CONSEQUENCES OF FAILURE TO FILE PROOF OF CLAIM Any creditor that is required to file but fails to file a proof of claim for its Claim in accordance with the procedures set forth herein on or before the General Bar Date, the Governmental Bar Date, or such other date established hereby (as applicable) shall be forever barred, estopped, and enjoined from: (a) asserting any Claim against the Debtors that (i) is in an amount that exceeds the amount, if any, that is set forth in the Schedules as undisputed, noncontingent, and unliquidated or (ii) is of a different nature or in a different classification (any such claim referred to as an "Unscheduled Claim") and (b) voting upon, or receiving distributions under, any plan or plans of reorganization in these chapter 11 cases in respect of an Unscheduled Claim; and the Debtors and their property shall be forever discharged from any and all indebtedness or liability with respect to such Unscheduled Claim. If it is unclear from the Schedules and Statements whether your Claim is disputed, contingent or unliquidated as to amount or is otherwise properly listed and classified, you must file a proof of claim on or before the General Bar Date. Any Entity that relies on the Schedules and Statements bears responsibility for determining that its Claim is accurately listed therein.**

Claims Bar Date Notice, p. 5 (emphasis in original); see also Export Development Canada v. Circuit City Stores Inc. (In re Circuit City Stores, Inc.), Case No. 08-35653, at 8 (Feb. 4, 2010) ("The requirement of a Bar Date in Chapter 11 enables the debtor . . . to establish the universe of claims with which it must deal and the amount of those claims. As Bar Dates in Chapter 11 bankruptcy cases serve such a very important purpose, courts do not allow claims filed by creditors after the bar date, absent special circumstances." (internal quotation and citation omitted)).

It is indisputable that the Debtors served the Claims Bar Date Notice on all current and former employees for the three years preceding the Petition Date, (Docket No. 1314), and published the Claims Bar Date Notice in The Wall Street Journal (Docket No. 1395) and The Richmond Times-Dispatch (Docket No. 1394). Thus, the Unnamed Claimants with respect to whom the Named Claimants seek discovery either filed a timely proof of claim or failed to do so.

If an Unnamed Claimant filed a proof of claim, continued pursuit of the Class Claims on that Unnamed Claimant's behalf is unnecessary and duplicative. Indeed, there was no express authority for Class Counsel to file a proof of claim on such Unnamed Claimant's behalf, and any

discovery by counsel with respect to the Unnamed Claimant's identity and claims is irrelevant to the Named Claimants' claims and is improper.

To the extent that an Unnamed Claimant failed to file a proof of claim, that Unnamed Claimant's possible claim against the Debtors' estates is now barred. See Claims Bar Date Order at ¶ 12 (stating that any creditor who fails to file a proof of claim by the General Bar Date will be forever barred, estopped, and enjoined from asserting any claim against the Debtors). This Court should not permit the unauthorized filing of a class proof of claim on that Unnamed Claimant's behalf to circumvent this Claims Bar Date Order. See In re W.R. Grace & Co., 389 B.R. 373, 380 (Bankr. D. Del. 2008) (noting that allowing a class proof of claim would allow an "end run around the bar date. In that respect, class certification would adversely affect the bankruptcy proceedings by permitting those who missed the bar date and who received at least publication notice to interpose claims into this case, without establishing the excusable neglect standard expressed in Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership."); In re FIRSTPLUS Financial, Inc. 248 B.R. 60, 73 (Bankr. N.D. Tex. 2000) (noting that "since all of the members of the putative class received

actual notice by mail, and constructive notice by publication, of the Debtor's bankruptcy and of the Claims Bar Date, the claims of those persons who did not file a proof of claim with the Court are barred. [Thus,] were the Court to allow the class proof of claim to stand, such action would allow a second bite at the apple for those creditors who received notice of the bankruptcy filing and of the Claims Bar Date, and who chose not to file. Such a result would be inequitable to the Debtor's other creditors who are bound by the bar date"). Thus, here again, any discovery as to the identity of such Unnamed Claimants and whether they might hold priority claims is entirely irrelevant.

Consequently, even assuming that some Unnamed Claimants could have asserted priority claims and that the Named Claimants could have represented them on a class proof of claim, this Court should still deny the Continuance Request. The Unnamed Claimants have either already protected their interests by filing their own proofs of claim and, thus, do not need to be represented by Class Counsel; or, the Unnamed Claimants are now estopped from pursuing and/or have waived their right to pursue any such

claims as a result of their failure to file a proof of claims prior to the General Bar Date.

Accordingly, the requested discovery is entirely irrelevant to the Summary Judgment Motions and the Continuance Request should be denied.

II. THE COURT SHOULD DENY THE CONTINUANCE REQUEST UNDER CIVIL RULE 56(F) BECAUSE THE NAMED CLAIMANTS WERE NOT PRECLUDED FROM TIMELY CONDUCTING DISCOVERY AND CANNOT SEEK SUCH DISCOVERY AT THIS LATE DATE.

Finally, throughout the Continuance Request, the Named Claimants avoid addressing the substantive arguments made in the Summary Judgment Motions and the Supplemental Objections regarding the non-priority of the Named Claimants' claims and their failure to file a motion under Bankruptcy Rule 7023 by contending that they must first conduct discovery and have been precluded from doing so. As demonstrated above, the Debtors maintain that no such discovery is, or was ever, necessary. However, to the extent that the Named Claimants contend otherwise, the fault lies with them and their failure timely to pursue any discovery they thought was required.

First, as discussed above, the court in Computer Learning made clear that "the issue in controversy is whether the proof of claim may be filed as a class proof of

claim in the first instance. This is the contested matter." Computer Learning, 344 B.R. at 88. Had the Named Claimants made a motion under Bankruptcy Rule 7023 that the Debtors opposed, a contested matter would have existed under Bankruptcy Rule 9014. Bankruptcy Rule 9014, in turn provides that certain Bankruptcy Rules will apply, including Bankruptcy Rules 7026 and Bankruptcy Rules 7028 to 7037 -- i.e. the rules governing discovery. Thus, again, had the Named Claimants' proceeded properly, they would have been entitled to commence discovery before the bar date.

Moreover, the Named Claimants could have conducted discovery in these cases even before filing a motion under Bankruptcy Rule 7023. Specifically, under Bankruptcy Rule 2004, this Court "may order an examination of any entity," including the Debtors, regarding, among other things, information relating to "the acts, conduct, or property or to the liabilities of the debtor . . . ." Fed. R. Bankr. P. 2004(a), (b). As the Court knows, Bankruptcy Rule 2004 permits broad discovery, and since Rule 2004 expressly provides for an investigation as to the liabilities of the Debtors, it plainly covers any claims that may be asserted against the Debtors. Consequently, even before filing a

motion under Bankruptcy Rule 7023, the Named Claimants could have requested any discovery they believed necessary.

Furthermore, the Debtors objected to the Class Claims in June and August of 2009, more than six months ago. In so doing, a contested matter existed and, thus, the Named Claimants were free, without leave of court, to commence discovery. Again, they failed to do so.

And finally, the Named Claimants concede that they always had an avenue for commencing discovery, stating "[c]reditors appreciate, that either side in this case could have filed a motion for leave to conduct discovery in this Court. . . ." Continuance Request at 8. Thus, this Court should not now grant their untimely request for discovery and adjourn the hearing on the Summary Judgment Motions and the Supplemental Objections.[17]

Specifically, despite having ample opportunity to request discovery, the Named Claimants waited until the Debtors filed their Summary Judgment Motions and

[17] The Named Claimants contend that Debtors' counsel advised them that they should not pursue discovery. The Debtors do not believe they made any such statement to opposing counsel unless it was after the filing of their Summary Judgment Motions. In any event, as this Court has held in a similar context, Debtors' counsel have no duty to respond to creditor inquiries and were not responsible for a creditor's failure to properly pursue its claim. Export Development Canada v. Circuit City, Case No. 08-35653 at 7, n. 7.

Supplemental Objections. This they should not be permitted to do. See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1554 (10th Cir. 1993) ("[I]f the party filing the Rule 56(f) affidavit has been dilatory . . . no extension will be granted."); U.S. v. Bob Stofer Oldsmobile-Cadillac, Inc., 766 F.2d 1147, 1153 (7th Cir. 1985) ("A party who has been dilatory in discovery may not use Rule 56(f) to gain a continuance where he has only made vague assertions that further discovery would develop genuine issues of material fact.").

Thus, while the Debtors believe no further information is necessary or relevant at this juncture, to the extent the Named Claimants contend they lack the requisite information, that failure is their own.

Finally, should this Court allow the Named Claimants to delay the hearing on the Summary Judgment Motions and the Supplemental Objections and to conduct discovery, the Debtors will be materially prejudiced. At this time, the Debtors are attempting to resolve as many claims as possible in their chapter 11 cases in advance of confirmation of the Plan. The Class Claims assert priority claims of almost $150 million. Thus, the Class Claims are significant and, as priority claims, would be required to be

paid in full prior to payment of any general unsecured claims. See Plan at Art. III. As a result, it is important that the priority and class status of the Class Claims be resolved as soon as possible to enable the Debtors to proceed with confirmation, demonstrate that the Plan is feasible, and provide a distribution to unsecured creditors as soon as possible after the effective date of the Plan. Consequently, further delay of a ruling on the Summary Judgment Motions and the Supplemental Objections significantly prejudices the Debtors and their estates and creditors.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Summary Judgment Motions and the Supplemental Objections, the Summary Judgment Motions should be granted and the Supplemental Objections should be sustained.

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